the witnesses were called I would not permit their testimony to be entered into the record. *The only matters that may be entered into are, first, your response to the rule—in which there is no attempt on your part to say you didn't sign it or that you weren't there or something of that sort—and, second, no attempt on your part to disavow the instrument in some part or other.* Those two matters you more or less indicated to the Court your position on. I am not attempting to have you commit yourself because what you have stated to the Court is the truth, exactly what you have done. Now it becomes this Court's duty to advise you as to what my attitude is or what my decision is towards the filings made by an attorney. You are in a different category than say the witnesses or the laymen. Now, to this ruling you have the privilege, of course, of taking whatever exception you have— (emphasis added).'

The court repeated its ruling that the only question to be decided was whether appellant filed the motion to recuse (A. 21-22):

The Court: I thank you, Mr. Spencer. Did you wish to take exception or make any exception? I don't think it is necessary, but I don't want to cut you off in any way and have someone say that you did not take an exception.

The Court has made its ruling. Do you understand it? I will reiterate it so that you will understand it. The Court rules that, and I understand from what you have told me that you have subpoenaed certain witnesses and the thrust of what you expect to prove from

those witnesses, *and that in neither instance was it a plea, as I interpret it, of a disavowal of the filing of the document, that you didn't do it, that someone else did it.* Now, those are the two points that the Court feels would be a proper area for the Court to check into.

Now, if you have nothing else, the Court rules that the testimony of the subpoenaed witnesses, who, as I understand from you, are the District Court Judges of the First Judicial District Court, comprising—is it four men? (Emphasis added.)

The court having made it abundantly clear what the issues were, it would have been futile for appellant to persist in asserting his right to pursue other matters. Involved then and there in one contempt proceeding, it is perfectly understandable that he would go out of his way to avoid another, which is itself a concrete example of the debilitating effect that arbitrary contempt charges have upon a lawyer's conduct in court.

Under these circumstances, the Court should, at minimum, vacate the judgments below and direct the state courts to entertain further evidence to clarify the record.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

MELVIN L. WULF
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, N. Y. 10010

Attorney for Appellant

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

MELVIN L. WULF

May 26, 1970.